**GONDOLA MOTOR CREDIT SDN. BHD.**

**v.**

**ALMURISI HOLDINGS SDN. BHD.**

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[ORIGINATING MOTION NO. 25-35 OF 1989]
3 MAY 1990

***LAND LAW:*** *Priorities - Equities - Applicant not registered proprietor - Section 327 National Land Code 1965 - Caveat - Agreement for sale and purchase - Character and effect of certificate of sale - Sections 259(3), 265(4), 267 National Land Code 1965.*

Tanjong Petrie (TP) owned the property in question and on 10 April 1980 granted an option to purchase this property to one of its directors named S. S has been in possession of the property since that date. About one and a half year's later TP charged the property to Singapore Finance Ltd. whilst S was still a director of Tanjong Petrie.

Pursuant to the option, S appointed the respondent company, of which he was a director, as his nominee. On 29 June 1985 a sale and purchase agreement was entered between Tanjong Petrie and the respondent company. Three payments were made under this agreement on 29 June 1985, 5 July 1985 and 1 April 1986, leaving a balance of approximately RM28,000 outstanding. On 28 March 1986, the respondent company lodged a private caveat in respect of the property. S and the respondent company sought and obtained an order for specific performance of the agreement dated 29 June 1985 and for delivery of the title deed.

Singapore Finance Ltd. put up the property for public auction as a result of non-payment of the principal sum and interest. The applicant was the successful bidder and a certificate of sale was issued; however the certificate could not be registered because of the private caveat lodged by the respondent company.

The applicant thus applied under s. 327 of the National Land Code for removal of the private caveat and for registration of the certificate of sale.

**Held:**

**[1]** As long as there is in existence a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement. The respondent was therefore entitled to enter the caveat.

**[2]** The combined effect of ss. 259(3), 265(4) and 267 of the National Land Code is that until registration, the applicant's certificate of sale, although characterized statutorily as an instrument of sale, does not *per se* enhance the applicant's equitable interest acquired subsequent to the respondent's caveat so as to equal, let alone override, the respondent's priority of interest established by the caveat. It is not inequitable for the respondent to insist on its priority against the applicant especially when the applicant purchased the property subject expressly to the caveat.

*[Applicant's motion dismissed.]*

**Cases referred to:**

*Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 214*
*United Malayan Banking Corporation Bhd. v. Goh Tuan Laye & Ors. [1976] 1 MLJ 169*
*Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53*
*Crosbie-Hill v. Sayer [1908] 1 Ch 866*
*Abigail v. Lapin [1934] AC 491*
*Zeno Ltd. v. Prefabricated Construction Co. (Malaya) Ltd. & Anor. [1967] 2 MLJ 104*

**Legislation referred to:**
National Land Code 1965, ss. 267, 327

*For the applicant - Zainab Jan bte. Abdul Ghafoor; M/s. T.K. Lim & Co.*
*For the respondent - Mohd Shariff bin Mohd Ali; M/s. Shariff & Som*

**JUDGMENT**

**LC Vohrah J:**

The applicant has moved the Court under s. 327 of the National Land Code to direct the Pengarah Tanah dan Galian, Johor, to remove a private caveat filed on 25 March 1986 by the respondent in respect of land held under H.S.(D) 23635 PTB 8647 in the township of Johor Bahru ("the said property") and also to register the applicant's certificate of sale issued by the Registrar of the Court on the successful completion of a judicial sale.

From the affidavit evidence tendered by the applicant and the respondent and from the related files referred to therein, the following facts have been established. The said property is a 4-storeyed shop-house at No. 6E, Jalan Larkin, Johor Bahru. It was registered in the name of Tanjong Petrie Enterprise Sdn. Bhd. ("Tanjong Petrie"). On 10 April 1980 Tanjong Petrie granted an option to purchase the said property to one Shaikh Mohamad bin Shaikh Tahir, who was then one of its directors, at the price of RM199,750 in the following terms:

In consideration of the sum of RM39,950 (Ringgit Malaysia Thirty nine thousand nine hundred and fifty) only paid by you to us (the receipt of which sum we hereby acknowledge), we hereby grant you an option to purchase the abovementioned property upon the following conditions:

1) the purchase price shall be RM199,750 (Ringgit Malaysia One hundred and ninety-nine thousand seven hundred and fifty) only;

2) the sum of RM39,950 shall not be refunded should you fail to exercise the option during the period stated below but should you exercise the option, the sum of RM39,950 shall be treated as part payment towards the purchase price;

3) this option shall only be exercised after the expiry of 5 years from 1 April 1980 (that is after 1 April 1985) and before 30 May 1985 by 4.00 p.m. by paying a further sum of RM39,950 towards the purchase price to Messrs Nathan & Yang, Advocates & Solicitors of No. 16C, Third Floor, Tan Chan Cheng Building, Jalan Station, Johor Bahru, who are our solicitors or to any solicitor appointed by us;

4) the final balance of the purchase price shall be paid within three (3) months of the exercising of the option;

5) all quit rent, assessment and other outgoings as from 1 April 1980 shall be paid by you to the appropriate authorities;

6) the said property shall be maintained by you in good order and repair and you should not in any way breach any rules or regulations of the local authorities;

7) you are at liberty to rent the premises to your tenants;

8) in the event of your failing to exercise this option within the time stipulated you are to deliver vacant possession to us forthwith;

9) this option shall be binding on our respective assigns, beneficiaries, nominees and representatives.

Dated this 10 April 1980.

On 15 November 1981 the said property was however charged by Tanjong Petrie to Singapore Finance Limited at a time when Shaikh Mohamad was still a director of Tanjong Petrie. Pursuant to the option granted to him, Shaikh Mohamad had appointed the respondent, of which he is a director, as his nominee and a sale and purchase agreement (SMST-2, Encl. 5) was entered into on 29 June 1985 between Tanjong Petrie and the respondent in pursuance of which the respondent made two further payments of RM39,950 on 29 June 1985 (SMST-2, Encl. 8) and of RM41,075 on 5 July 1985 (SMST-3, Encl. 8) leaving a balance of RM78,775 to be paid in respect of the purchase price. On 5 January 1986 Shaikh Mohamad's solicitors wrote to the solicitors of Tanjong Petrie informing them that the respondent was ready and able to pay the balance sum upon Tanjong Petrie making available the title deed to the said property for its transfer to the respondent as follows:

We refer to the above-mentioned matter. We are instructed to inform you that the further negotiation between our client and your client sometime in November 1985 was that within one (1) month thereafter your client was to make the Title Deed to the property available for our further action. One (1) month has since passed.

We wish also to stress that the transfer document has been adjudicated and ready for registration and further our client is ready and able to forward your client the difference in the purchase price amounting to RM78,775. We have therefore been instructed to give you one (1) month's notice from the date hereof to have the Title Deed ready upon our client forwarding your client the balance of the purchase price failing which our client has given us instructions to commence legal proceedings against your client for specific performance and/or alternatively damages for breach of contract.

On 1 April 1986 the respondent made a further payment of RM50,000 (SMST-4, Encl. 8) leaving a balance of RM28,775 still to be paid. On 25 March 1986 the respondent lodged a private caveat in respect of the said property and on 9 September 1986 and action was filed by Shaikh Mohamad and the respondent against Tanjong Petrie in C.S. No. 22-1158-86 in the Johor Bahru High Court for specific performance of the sale and purchase agreement and for delivery of the title deed. On 4 February 1987 Shaikh Mohamad and the respondent obtained an order (SMST4, (Encl. 5) from the Senior Assistant Registrar for, *inter alia*, judgment to be entered against Tanjong Petrie in default of defence and for Tanjong Petrie to deliver the title deed of the said property to the respondent. That order still stands. Shaikh Mohamad has been in possession of the property since 10 April 1980 when the option to purchase the said property was given to him and only resigned as director of Tanjong Petrie on 30 April 1985 well after the said property was charged to Singapore Finance Limited. The said property was put up for public auction at the instance of Singapore Finance Limited in foreclosure action O.S. No. 31-71/87 for non-payment of the principal sum and interest despite repeated demands. The applicant was the successful bidder at the public auction on 2 July 1989 and on full payment of RM260,000 having been made, the certificate of sale by the Court was issued by the Senior Assistant Registrar on 7 November 1989. The certificate of sale could not be registered because of the private caveat which had been lodged by the respondent. The proclamation of sale in respect of the public auction of the said property however had the following description:

> Caveat: PTB 8647
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> Private Caveat entered by Almurisi Holding's Sdn. Bhd. *vide* Caveat Serial No. 681/86 Jilid No. 228, Folio 26 dated 25 March 1986.

As the applicant, not being the registered proprietor, has made this application under s. 327 of the National Land Code, it has to satisfy the Court that there are sufficient grounds in fact and in law for the caveat to be removed: See *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 214. Counsel for the applicant argues that it is aggrieved by the existence of the private caveat because although it has paid the full purchase price it has been unable to register the certificate of sale and contends that the option granted to Shaikh Mohamad was not a *bona fide* transaction because "as a purchaser cum director of" Tanjong Petrie Enterprise Sdn. Bhd. he should have objected to the charging of the said property in favour of Singapore Finance Limited and that as he must have had either full knowledge or constructive knowledge of the charge when he signed the sale and purchase agreement on 29 June 1985 on behalf of the respondent its caveat "is bad in law and void of any effect and ought to be removed". She also argues that if the Court should consider that the respondent does have a caveatable interest then the question of two equities arises in which event on the authority of *United Malayan Banking Corporation Bhd. v. Goh Tuan Laye & Ors.* [1976] 1 MLJ 169 relating to competing equities which had not been registered, the applicant having paid the full purchase price and having in its possession the title deed to the said property has a better equity as *bona fide* purchaser whereas the respondent had been guilty of omission in not objecting to the creation of the charge and in not intervening in the foreclosure action. In reply Counsel for the plaintiff argues that no evidence has been adduced to show that the granting of the option to purchase the said property was not *bona fide* and pointed out that the option could not have been exercised for 5 years from the date it was given and that at the time the charge was created on 15 November 1981, Shaikh Mohamad had about another 4 years to wait before he could exercise his option. He also argued that on the authority of *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53 relating to a purchaser's entitlement to enter a caveat to protect his rights under a valid agreement for the sale of land, the respondent was entitled to enter the caveat and that accordingly the burden was on the applicant to show that the respondent had wrongfully caveated the said property. He argues further that the predicament in which the applicant has found itself in is the result of its own doing in ignoring the fact that the proclamation of sale had specifically described the said property to have been encumbered with the caveat so that the respondent with the prior equity which has been registered is entitled to have the application dismissed with costs.

It has not been possible for me, on the affidavit evidence that has been presented by the applicant, to make a finding as to whether the granting of the option by Tanjong Petrie to Shaikh Mohamad was a *bona fide* transaction or not. Nor do I think, on the evidence as it stands, that any adverse inference can be drawn against the respondent for failing to object to the creation of the charge in favour of Singapore Finance Limited by Tanjong Petrie of which he was then a director in the light of the reason given by Counsel for the respondent (as stated earlier) to the effect that the 5-year period had not expired or for failing to intervene in the foreclosure proceedings brought at the instance of Singapore Finance against Tanjong Petrie in the light of the caveat whose very function is to prevent the respondent's interest from being overridden by any interest acquired subsequently in respect of the said property. That the respondent was entitled to enter the caveat is clear from the case of *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53 wherein Gill CJ (Malaya) stated at p. 54:

> It would seem abundantly clear from the authorities that, so long as there is in existence a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement.

Counsel for the respondent has put much stress on the status of the certificate of sale issued by the Court after the completion of the judicial sale as against the sale and purchase agreement executed by the respondent because of the characterization given to it in s. 267 of the National Land Code relating to the effects of a sale by public auction, the relevant provisions of which read as follows:

> (1) Any certificate of sale given to a purchaser under sub-section (3) of s. 259 or sub-section (4) of s. 265 in respect of any charged land or lease shall be treated for all the purposes of this Act as **an instrument of dealing,** and shall be registrable accordingly under Part Eighteen; and, **upon the registration thereof**:
>
> (a) the title or interest of the chargor shall pass to and vest in the purchaser, freed and discharged from all liability under the charge in question and any charge subsequent thereto;...
>
> (Emphasis is mine)

The comparison, in my view, should be made not between the status of the certificate of sale and that of the sale and purchase agreement but between the former and the status of the caveat lodged by the respondent. The effect of the above provisions, in my view, is that until registration the applicant's certificate of sale although characterized statutorily as an instrument of dealing does not *per se* enhance the applicant's equitable interest acquired subsequent to the respondent's caveat so as to equal, let alone override, the respondent's priority of interest established by the caveat. Although it is clear on the authorities (*Crosbie-Hill v. Sayer* [1908] 1 Ch. 866, *Abigail v. Lapin* [1934] AC 491 and *Zeno Ltd. v. Prefabricated Construction Co. (Malaya) Ltd. & Anor.* [1967] 2 MLJ 104, to name a few) that one's prior equity can be defeated or postponed by some act or omission on one's part, I fail to see how the facts in this case can be considered to have rendered it inequitable for the respondent to insist on its priority against the applicant especially when the applicant purchased the said property subject expressly to the caveat.

This motion is accordingly dismissed with costs.

Also found at [1990] 2 CLJ 182